

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAKISHA TRICIA MUNLIN,

Defendant-Appellant.

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UNPUBLISHED

September 23, 2014

No. 315918

Oakland Circuit Court

LC No. 2012-241613-FH

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial convictions of arson of a dwelling house, MCL 750.72,<sup>1</sup> arson of personal property worth \$200 or more but less than \$1000, MCL 750.74(1)(b)(i),<sup>2</sup> and malicious destruction of a building causing damage or injury of \$200 or more but less than \$1000, MCL 750.380(4)(a). The trial court sentenced defendant to concurrent terms of 30 months to 20 years' imprisonment for the arson of a dwelling house conviction and 365 days for each of her other convictions. We affirm defendant's convictions and sentence.

Defendant's convictions stem from an incident in March 2012 in the city of Pontiac. Defendant broke out the windows in her boyfriend's residence and then set fire to his car, which was parked directly next to the house.

Defendant first argues the trial court erred in refusing to instruct the jury that it could infer that evidence of the missing house siding and backing would have been favorable to defendant. We disagree. We review the appropriateness of such instruction for an abuse of discretion. See *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010); *People v Eccles*, 260 Mich App 379; 289; 677 NW2d 76 (2004).

Defendant argued at trial that the instruction was appropriate because it pertained to her theory that the house never burned. As the trial court correctly noted, an adverse inference instruction such as that requested by defendant was inappropriate because there was no evidence

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<sup>1</sup> MCL 750.72 has since been amended by 2012 PA 531, which was effective April 3, 2013.

<sup>2</sup> MCL 750.74 has since been amended by 2012 PA 532, which was effective April 3, 2013.

of bad faith on the part of the prosecution in failing to produce the evidence. *People v Cress*, 250 Mich App 110, 157-158; 645 NW2d 669 (2002), rev'd on other grounds 468 Mich 678 (2003). The evidence established that firefighters did not collect the siding for testing because it was not the origin of the fire and the homeowner later replaced the damaged siding. There is no suggestion that the siding and backing of the house would have been exculpatory, given testimony by first responders, the fire investigator, and the owner of the house establishing that the house actually burned. Overall, there was simply no evidence of bad faith in failing to preserve the evidence, and therefore, the instruction was inappropriate. Accordingly, the trial court did not abuse its discretion in refusing to give the instruction.

Defendant next contends that resentencing is required because the trial court erroneously scored the sentencing guidelines. We disagree. Under the sentencing guidelines, we review a trial court's factual determinations, which must be supported by a preponderance of the evidence, for clear error. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). We review de novo whether the facts were sufficient to assess a particular score. *Id.*

Defendant asserts that the trial court improperly assessed 20 points for Offense Variable (OV) 1 and 15 points for OV 2 because she did not use an incendiary device. OV 1 addresses the aggravated use of a weapon, and directs a trial court to assess 20 points if the victim was subjected or exposed to an incendiary device. MCL 777.31(1)(b); *People v Morson*, 471 Mich 248, 256; 685 NW2d 203 (2004). OV 2 addresses the lethal potential of a weapon possessed or used during the commission of the offense, and directs a trial court to assess 15 points if the offender possessed or used an incendiary device. MCL 777.32(1)(b); *People v Young*, 276 Mich App 446, 451; 740 NW2d 347 (2007). Under both OV 1 and OV 2, an "incendiary device" is defined as "gasoline or any other flammable substance, a blowtorch, fire bomb, Molotov cocktail, or other similar device." MCL 777.31(3)(b); MCL 777.32(3)(d).

Defendant admitted that she started a fire in the car by lighting a plastic bag with her lighter and placing it in the car. A butane lighter, like a blowtorch, uses a flammable liquid stored in the device to create a fire, and thus could be a "similar device" under MCL 777.31(3)(b) and MCL 777.32(3)(d). Therefore, we conclude that the trial court did not clearly err in determining that a lighter was an "incendiary device." Accordingly, the trial court properly assessed 20 points for OV 1 and 15 points for OV 2.

We also conclude that the trial court properly assessed 10 points for OV 9, which addresses the number of victims. MCL 777.39(1); *People v Fawaz*, 299 Mich App 55, 62; 829 NW2d 259 (2012). The trial court should assess 10 points for OV 9 if there were two to nine victims who were placed in danger of physical injury or death. MCL 777.39(1)(c). In scoring OV 9, each person who was placed in danger of physical injury or loss of life must be counted as a victim. MCL 777.39(2)(a). A first responder can be a victim. *Fawaz*, 299 Mich App at 63.

In this case, the evidence established that both a police officer and a firefighter entered the home after it caught on fire and that one resident of the home was inside when defendant set the car on fire. Given these circumstances, there were between two and nine victims who were placed in danger of physical injury or death, which sufficiently justified the court's assignment of 10 points for OV 9.

Affirmed.

/s/ Donald S. Owens

/s/ Kathleen Jansen

/s/ Peter D. O'Connell